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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations.)

MM Docket No. 00-148
RM-9939
RM-10198

(Quannah, Archer City, Converse, Flatonia,
Georgetown, Ingram, Keller, Knox City,
Lakeway, Lago Vista, Llano, McQueeney,
Nolanville, San Antonio, Seymour, Waco and
Wellington, Texas, and Ardmore, Durant,
Elk City, Healdton, Lawton and Purcell,
Oklahoma.))

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: John A. Karousos, Chief
Allocations Branch, Policy and Rules Division
Mass Media Bureau

PARTIAL OPPOSITION TO "MOTION TO ACCEPT SUPPLEMENT"

1. Elgin FM Limited Partnership and Charles Crawford ("Elgin FM/Crawford") hereby oppose, to the extent described below, the "Motion to Accept Supplement" ("Motion") submitted in the above-captioned proceeding by First Broadcasting Company, L.P., Rawhide Radio, L.L.C., Next Media Licensing, Inc., Capstar TX Limited Partnership and Clear Channel Broadcast Licenses, Inc. ("Joint Parties"). To the limited extent that the Joint Parties' Supplement may properly be considered, that Supplement plainly establishes that the Joint Parties' Counterproposal, submitted in October, 2000 and amended twice since, was not technically correct or substantially complete and must, therefore, be dismissed.

2. This proceeding began in July, 2000 with the filing of a minimal three-page petition for rule making proposing nothing more than the allotment of Channel 233C3 to

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Quanah, Texas, population 3,113. By Notice of Proposed Rule Making ("NPRM"), DA 00-1905, released August 18, 2000, the Commission proposed to amend the Table of Allotments consistent with the original proposal.

3. Two months later, the Joint Parties filed their Counterproposal -- a 500-page behemoth proposing changes (including down-grading and relocation) to no fewer than 23 allotments, changes which would result in new channel allotments in the immediate vicinities of Dallas, Austin and San Antonio. Despite the seemingly short time -- only two months -- between the release of the NPRM and the filing of the Counterproposal, the Joint Parties claimed to have engaged in "extensive preparatory work" relative to their grandiose proposal. And indeed, the Joint Parties provided signed, but undated, statements of agreement from six licensees whose authorizations would be modified by the proposed changes. The Joint Parties also included in their voluminous showing materials apparently obtained as early as February, 1999 ^{1/}, suggesting that the Joint Parties' "extensive preparatory work" had predated not only the NPRM, but also the original petition for rule making, by some 18 months.

4. Central to the gargantuan Counterproposal was the concept that Channel 233C3, the subject of the original proposal and the NPRM, should not be allotted to Quanah. The Joint Parties contended, however, that that was not a substantial concern, since (according to the Joint Parties) an alternate channel was available to Quanah. The Joint Parties argued that, because an alternate channel was supposedly available for Quanah, "the Commission's usual strict compliance standard for counterproposals should not apply in this

^{1/} See, e.g., Counterproposal, Exhibit 2, (unnumbered) pages 1-9, all reflecting the date of February 21, 1999 and (unnumbered) pages 10-25, all reflecting the date of March 3, 1999.

case." Counterproposal at 5.

5. While the Joint Parties did not provide any supporting citations explaining what they meant by "the Commission's usual strict compliance standards for counterproposals", they presumably were referring to the fact that, for more than a decade, the Commission has insisted that rule making counterproposals be "technically correct and substantially complete" as of the date of filing. *See, e.g., Broken Arrow, Oklahoma et al.*, 3 FCC Rcd 6507, 6511, n. 2 (Policy and Rules Division 1988); *Springdale, Arkansas et al.*, 4 FCC Rcd 674, 677, n. 7 (Policy and Rules Division 1989); *Detroit, Texas et al.*, 13 FCC Rcd 16561, 16563 (Allocations Branch 1998). The basis for that prophylactic policy is clear: because of the limited ability of interested parties to respond to counterproposals (and particularly the *inability* of interested parties to submit further "counter-counterproposals" to counterproposals), counterproponents must be sure that their counterproposals are correct when filed. *E.g., Broken Arrow, supra.*^{2/} Pursuant to this strict policy, the Commission has rejected attempts by counterproponents to submit supplements, to correct supposed typographical errors, or even to submit additional copies when an inadequate number of copies had been submitted on the deadline for counterproposals. *E.g., Springdale, supra; Frederiksted, Virgin Islands et al.*, 12 FCC Rcd 2406, 2407 (Allocations Branch 1997); *Franklin, Louisiana et al.*, 12 FCC Rcd 20168 (Allocations Branch 1997).

6. As it turns out, the Joint Parties' Counterproposal *was* flawed, as the Joint

^{2/} Very recently, the Allocations Branch has expressed concern about fairness to other parties in connection with the filing of proposals as counterproposals for the seeming strategic purpose of foreclosing other counterproposals. *Taccoa, Georgia et al.*, DA 01-2784, released November 30, 2001.

Parties have now twice acknowledged. Most importantly, their most recent acknowledgement (in their Motion and accompanying Supplement) demonstrates that, contrary to their confident assurances in their Counterproposal, in fact no substitute channel for Quanah is available under their proposal. This is especially important because, even if the Joint Parties' claimed exemption from the "Commission's usual strict compliance standards" were deemed, for the sake of argument, to have been valid, the basis for that claimed exemption -- the supposed availability of an alternate Quanah channel -- has now left the building. And with it has gone any arguable exemption from the "Commission's usual strict compliance standards."

7. In other words, the Counterproposal had to be correct when filed. And, by the Joint Parties' repeated acknowledgements, it was not.

8. First, by Response to Request for Supplemental Information ("Response") filed on November 13, 2001, the Joint Parties acknowledged that the proposed reference site for their proposed Lakeway channel -- which they themselves had identified in the Counterproposal as 30° 18' 27" N and 97° 46' 46" W -- were "erroneous". This acknowledgement came only after Elgin FM/Crawford had pointed out to the Commission that the Lakeway coordinates specified in the Counterproposal are located in or immediately next to the Colorado River, making it unavailable and/or unsuitable as a reference site. When the Commission, acting in response to this observation, sought confirmation of the accuracy of the Elgin FM/Crawford assertion, the Joint Parties conceded the correctness Elgin FM/Crawford's assertion and, therefore, the incorrectness of the Joint Parties' Counterproposal in that regard.

9. Second, as noted above, in their Motion and "Supplement" the Joint Parties acknowledge yet a further error in their Counterproposal: now they concede that the substitute channel which they had claimed would be available for Quanah is not, in fact, available.

10. Since (as the Joint Parties expressly recognized in the Joint Petition (at page 5)) the usual strict compliance standards for counterproposals must apply to their own Counterproposal, and since the Joint Parties have twice now conceded that that Counterproposal -- both as submitted and as of the reply comment deadline -- was *not* correct, their Counterproposal can and must be dismissed.

11. While the Joint Parties are clearly aware of the "usual strict compliance standards for counterproposals" (having themselves referred to those standards in their Counterproposal), their Motion and Supplement (and their earlier "Response") are curiously lacking in any serious discussion of those standards.

12. The Motion does not even refer to those standards. Instead, in the Motion the Joint Parties attempt to cloak their Supplement as an attempt to "enhance" or "complete" the record, Motion at 1, rather than say what it really is: an attempt to revise their Counterproposal to patch over an acknowledged error in that Counterproposal. This disingenuous approach should not be tolerated by the Commission: as filed, the Counterproposal was wrong, plain and simple, because the channel which the Joint Parties said could be allotted to Quanah in fact could *NOT* be allotted to Quanah. To call the Commission's attention to that gaping hole in their proposal months after the deadline for comments on their Counterproposal (and more than a year after the filing of the

Counterproposal itself) is not any mere "enhancement" or "completion" of the record.

Rather, it is an admission of a fatal defect, and should be treated as such.^{3/}

13. The Joint Parties' earlier "Response" is similarly disingenuous. There, at least, the Joint Parties cited the Commission's well-established policy that counterproposals must comply with all Commission requirements. Response at 4-5. But the Joint Parties tried to spin their way out of the reach of that policy by claiming that the Commission may accept a "late-filed cure" where, "as here, the acceptance of a cure would not require the denial of any other proposal in this proceeding." *Id.* The Joint Parties cited *Boalsburg, Pennsylvania et al.*, 7 FCC Rcd 7653, 7654, n. 7 (Policy and Rules Division 1992) and *Detroit, Texas et al.*, 13 FCC Rcd 16561, 16563 (Allocations Branch 1998) in support of that claim.

^{3/} As an apparent fallback position, the Joint Parties claim that their Counterproposal already contemplated the possibility that no alternative channel might be available for Quanah. See Supplement at 2. The problem with this argument is that it refers to two brief paragraphs, comprising less than one-half of a page, on page 4 of the 40-page (not counting the other 500 or so pages of additional materials) Counterproposal. There the Joint Parties stated conclusorily that "the fact that five communities, four of which are substantially larger than Quanah, would receive a first local service clearly favors the Counterproposal". Counterproposal at 4. The Joint Parties cited *Rose Hill, North Carolina et al.*, 11 FCC Rcd 21223 (Allocations Branch 1996), *Athens, Illinois et al.*, 11 FCC Rcd 3445 (Allocations Branch 1996) and *Blanchard, Louisiana et al.*, 8 FCC Rcd 7083 (Allocations Branch 1993) in support.

But the cited cases did **NOT** involve communities located in major metropolitan areas, as is the case here. That is, the relative sizes of competing communities may be dispositive if all other considerations are the same. But here, all other considerations are **NOT** the same. The Counterproposal refers to five communities which would receive a first local service. But four of those communities -- Keller, Lakeway, Lago Vista and Converse -- are all in or immediately proximate to major urbanized areas. And the fifth allotment cited by the Joint Parties -- Purcell, Oklahoma -- would result in a net *loss* of population served of 4,088 people, only slightly fewer than the population of Purcell (4,784).

In view of these circumstances, the Commission cannot accord any weight to the Joint Parties' minimal and not-wholly-informative passing reference to the supposed preferability of their counterproposal irrespective of whether an alternate Quanah channel is available.

14. Sure enough, both *Boalsburg* and *Detroit* involved acceptance, by the Commission, of some form of supplemental information. But (putting aside other material distinctions with the instant case) in both of the cited cases the Commission expressly stated that acceptance of the supplemental material was warranted because such acceptance would not prejudice other mutually exclusive proposals. 7 FCC Rcd at 7654-55, n. 7; 13 FCC Rcd 16561, 16563. In the instant case, that condition cannot be met. That is because, as the Commission is aware, the Joint Parties have gone to considerable effort to squash a number of other channel allotment proposals under the massive bootheel of their Counterproposal. *See, e.g., Shiner, Texas*, MM Docket No. 01-105; *Benjamin, Texas*, MM Docket No. 01-131; *Junction, Texas*, MM Docket No. 01-132; *Mason, Texas*, MM Docket No. 01-133. Having themselves made clear, repeatedly, their view that their Counterproposal warrants the dismissal of other allotment proposals, the Joint Parties cannot now claim that acceptance of their curative amendments, and the resulting last-minute saving of their Counterproposal, would not prejudice other mutually exclusive proposals.

15. The Commission has long held that counterproposals must be complete and accurate. The Joint Parties were aware of that when they filed their Counterproposal. The Joint Parties have now conceded that their Counterproposal was inaccurate in at least two material respects. The Commission has also long held that counterproponents are not entitled to file curative amendments. *E.g., Frederiksted, Virgin Islands, supra, citing Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990); *Springdale, Arkansas, supra*.

16. Elgin FM/Crawford do not oppose the Joint Parties' Motion to the extent that acceptance of the Joint Parties' Supplement alerts the Commission to a major flaw in the

Counterproposal. Elgin FM/Crawford strongly oppose acceptance of the Supplement for any other purpose. That is, the Joint Parties' Motion and Supplement (and their earlier Response) can and should be considered only to the extent that they constitute admissions, by the Joint Parties, of inaccuracies in the Counterproposal. Once those inaccuracies are acknowledged, the Commission's next step must be to dismiss the Counterproposal.

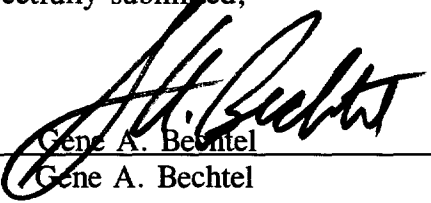
17. In a rulemaking context, the Commission opens the door for counterproposals when it issues the notice of proposed rulemaking. That door is closed and locked as of the date for comments/counterproposals. A party seeking to file a counterproposal is thus under an obligation to get its counterproposal right the first time or risk being locked out.

18. In this case, the Joint Parties tried to get through the door on the deadline with a proposal which, they now admit more than a year later, was not accurate in multiple respects. That admission puts them back on the outside looking in.

19. So Elgin FM/Crawford do not object to acceptance of the Joint Parties' Supplement (or Response) for the limited purpose of putting their admission on the record.

But once that admission is on the record, the Commission must reject the Counterproposal without further ado.

Respectfully submitted,


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December 11, 2001

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CERTIFICATE OF SERVICE

I, Gene A. Bechtel, hereby certify that on this 11th day of December, 2001, I caused copies of the foregoing "Partial Opposition to 'Motion to Accept Supplement'" to be hand delivered (as indicated below) or placed in the U.S. Postal Service, first class postage prepaid, addressed to the following persons:

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